

there is no clear and consistent evidence as to the exact date of the last instalment payment made by the defendant to the plaintiff. In any event, whichever the date, whether it be on 31 May 1984 as alleged by the plaintiff or on 26 January 1984 or 12 October 1981 as propagated by the defendant, the plaintiff could not be regarded as having gone beyond the limitation period of 12 years since, on the undisputed fact, it actually commenced suit against the defendant on 25 June 1991 as reflected in the writ of summons of the same date.

The defendant has also raised certain ancillary defences such as fraud, unlawful interference with contractual relations, breach of collateral contract, illegality of contract, negligence, etc. I do not find it necessary to go into any detail consideration on these issues; suffice it to say that having considered them with care, they contain no merit whatsoever. As regards the pleas raised in the counterclaim, I find them to be similar in substance and effect to the issues raised in the substantive defence. They are unsustainable on the merits.

For the reasons given and on the totality of the evidence as disclosed by the affidavits, I find the defendant has failed to satisfy the Court that there is any triable issue or question or that there ought to be a trial for some other reason. In my view, no arguable issue has been raised. It is a plain case which ought not to go to trial. In the circumstances, judgment in the sum of RM306,519 with interest thereon at the rate of 16% per annum until full payment should be entered for the plaintiff against the defendant. Accordingly, I will dismiss this appeal with cost.

a LIM SUNG HUAK & 9 ORS.

v.

**SYARIKAT PEMAJU TANAH TIKAM
BATU SDN. BHD.**

**b HIGH COURT, ALOR SETAR
DATO' K.C. VOHRAH J.
[CIVIL SUIT NO. 23-104-1992]
15 JULY 1993**

c *INJUNCTION: Application by defendant to set aside injunction - Non-disclosure of full and true facts by plaintiff - Statement of claim and affidavits contained misleading averments - Whether misleading averments and non-disclosure constituted sufficient grounds for discharge of injunction.*

d This was an application by the defendant to set aside an injunction obtained by the plaintiffs restraining the defendant from dealing with two lots of land one of which was registered in the name of the defendant. In the statement of claim the plaintiffs averred that all of them bought portions of the said land from the defendant. This averment was unfounded and untrue as in actual fact only the 7th plaintiff had ever bought a portion of the said land from the defendant. In the affidavit of the 1st plaintiff, sworn in support the application for the injunction, the same misleading statement was also averred. The facts further showed that except for the 8th plaintiff, all the other plaintiffs had purchased some portions of the said land from another firm but these purchases were not disclosed by the plaintiffs either in their affidavits or pleadings.

e The issue before the court was whether the misleading statements and non-disclosure of facts constituted sufficient grounds for setting the injunction aside.

Held:

f The misleading averments in both the statement of claim and the affidavit supporting the application for the injunction would be sufficient grounds to justify the discharge of the injunction.

[Application allowed].

Cases referred to:

R v. Kensington Income Tax Commissioners [1917] 1 KB 486 (**refd**)

g *Boyce v. Gill* [1891] 64 LJ 824 (**refd**)

h

Siporex Trade SA v. Comdel Commodities Ltd. [1986] NLJ 538 at 539 (**foli**)
Aspatra Sdn. Bhd. & 21 Ors. v. Bank Bumiputra Malaysia Sdn. Bhd. & Anor. [1988] 1 MLJ 97 (**dist**)
Jones v. Lipman [1962] 1 All ER 442 (**dist**)

Legislation referred to:
Specific Relief Act 1950, s. 26

For the plaintiffs - Ng Choo Hock (Anuar Bahari with him); G.B. Neoh Ng & Anuar
For the defendant - Kamilah bt. Kasim; M/s. Shahinuddin & Ranjit

JUDGMENT

K.C. Vohrah J:

This is an application by the defendant company to set aside an injunction restraining the company from selling, charging or leasing land comprised in 2 lots of land (the said land) in Mukim Pekula, Daerah Kuala Muda, Kedah, that is, Surat Putus 16703, Lot 263, (registered in the name of the defendant company on 20 April 1980) and Surat Putus 16706, Lot 318 (registered in the name of Tan Ah Bee on 15 May 1979 as trustee).

The 10 plaintiffs aver in paragraph 3 of their statement of claim that they bought portions of the said land from the said defendant company. This averment is, however, not true. From the various confusing exhibits filed in this case together with the affidavits to which they are attached what is revealed is that only the 7th plaintiff bought a portion of the said land from the defendant company. The 7th plaintiff also bought together with the rest of the plaintiffs, except for the 8th plaintiff, other portions from a firm by the name of Syarikat Pemaju Tanah Tikam Batu. The 8th plaintiff and also the 9th plaintiff were assigned, with the consent of the defendant company, portions of the said land by persons who had originally bought them from the same firm. What emerges therefore is that only the 7th plaintiff who had bought a portion of the land from the defendant company had privity of contract with the defendant company, not the rest.

In support of the application for the injunction the plaintiffs also relied on paragraph 5 of an affidavit affirmed by the 1st plaintiff (Enclosure 3) which repeated that the sale and purchase agreements were entered into between the plaintiffs and the defendant company.

Thus although the sale and purchase agreements and the assignments were exhibited in

a Enclosure 3 the fact remains that paragraph 2 of the statement of claim and paragraph 5 of the affidavit of the 1st plaintiff were misleading and did not disclose that the sale and purchase agreements (except for the one entered into by the 7th plaintiff) were entered into with a firm, not the defendant company. It has been stated that all the facts must be laid before the Court and nothing suppressed (see *R v. Kensington Income Tax Commissioners* [1917] 1 KB 486) otherwise the order of injunction may be set aside without regard to the merits (*Boyce v. Gill* [1891] 64 LJ 824). In any event in this case it is necessary to bear in mind what was stated by Bingham J. in *Siporex Trade SA v. Comdel Commodities Ltd.* [1986] NLJ 538 at 539 discharging a Mareva injunction, *inter alia*, for failure to make full and fair disclosure.

d ... an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarise his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied before applying and identifying any likely defences. He must disclose all facts which reasonably could or would be taken into account by the Judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed the Court may discharge the injunction even if after full enquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure.

g In my view the misleading averments in both the statement of claim and the affidavit supporting the application for the injunction would be sufficient to justify the discharge of the injunction.

h Subsequent affidavits filed by the plaintiffs after the application was made by the defendant company to discharge the injunction state that the person who executed the agreements with the plaintiffs or original purchasers (who assigned their rights to some of the plaintiffs) was either one Tan Ah Bee or Ghazali bin Mat Isa who Counsel for the plaintiffs says were "founding subscribers" of the defendant

company. Section 26 of the Specific Relief Act 1950 (Act 137) states:

26. Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against -

- (a) ...
- (b) ...

(e) when the promoters of a public company have, before its incorporation, entered into a contract, the company:

Provided that the company has ratified and adopted the contract and the contract is warranted by the terms of its incorporation.

There is no evidence to show that the two persons mentioned were promoters of the defendant company and then again that is not pleaded. In fact the relevant sale and purchase agreements mention the "vendors" as the firm and there is nothing in them to say that the contracts were entered into by the defendant company prior to its incorporation or by any person on behalf of the defendant company before its incorporation

Counsel for the plaintiffs also argue that the Court is entitled to look at all the circumstances and lift the corporate veil and to look at the fact that Tan Ah Bee and Ghazali bin Mat Isa who signed on behalf of the firm became founding subscribers of the defendant company and he relies on *Aspatra Sdn. Bhd. & 21 Ors. v. Bank Bumiputra Malaysia Sdn. Bhd. & Anor.* [1988] 1 MLJ 97 and *Jones v. Lipman* [1962] 1 All ER 442. He also points out that some of the plaintiffs who had been assigned certain portions of the said land by original buyers from the firm had the assignments consented to by the defendant company. It is disclosed that in 1976 when all the agreements were signed neither of the two pieces of the said land belonged to Tan Ah Bee or Ghazali bin Mat Isa or even the defendant company. The recitals in the agreements merely state that the vendors had agreed to purchase from the registered proprietors of the said two pieces of land. There was another original subscriber of the defendant company in 1976 in addition to Tan Ah Jee and Ghazali bin Mat Isa but in 1992, the year of the application of the issue of writ by the plaintiffs and the application for the injunction, about 16 years after the purchase by the plaintiffs of their portions of land, there is no evidence to show that Tan Ah Bee and Ghazali bin Mat Isa still remained as

- a shareholders. From the affidavit of one of the directors of the defendant company (Enclosure 23) it appears that the shareholders of the defendant company and its new directors who administer the company joined the defendant company in 1987 and all the directors do not know about Tan Ah Bee directly or indirectly.
- b It has to be noted, too, that Surat Putus 16703 was transferred to Tan Ah Bah (as trustee) in 1979 who then in 20 April 1980 transferred it to the defendant company. As for Surat Putus 16706 the land was transferred to Tan Ah Bee on 15 May 1979 as trustee, but there is no evidence as to who he is holding the land in trust for. It appears that the defendant company presently only owns one piece of property but what is not shown is to which person and when between 1979 and 1992 (when the writ was filed) either Tan Ah Bee or Ghazali bin Mat Isa transferred his share in the defendant company. At this late stage in the life of the defendant company after 16 years, in the absence of evidence to the contrary, it would appear that neither Tan Ah Bee Ghazali control the company and the cases of *Aspatra Sdn. Bhd.* and *Jones* are not quite relevant as they show that the defendants in both the cases wholly owned and controlled the assets of companies the veils of which were lifted. It seems to me the issue of lifting of the corporate veil cannot prevail in this case.

- e As for the 7th plaintiff in respect of the sale and purchase agreement entered into between him and the defendant company there was a recital to the effect that the company "had entered into an agreement to purchase from the registered proprietor" the said land and that the company had agreed to sell to him a portion of the said land on terms and conditions in the agreement. Under clause 3 of the agreement the company undertook to do several acts in consideration of the purchaser paying instalments within stipulated times one of which is "to apply for and obtain approval for the conversion, amalgamation and subdivision leading to a separate title for the portion sold" (see clause 3(b)). Clause 7 provides that in the event of the subdivision plan not being approved within 4 years from the date of the agreement (27 September 1976) then the purchaser was at liberty to give written notice of his intention to rescind the agreement. There was provision for refund of all moneys paid together with interest.
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- i This year is 1993 and there is still no approved subdivision plan and no written notice was ever

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Hj. Abdul Malek bin Hj. Ahmad J.

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given by the 7th plaintiff to the defendant company to rescind the contract. The contract was a conditional contract. Then again clause 9(a) provides that save, *inter alia*, for clause 7 (just mentioned) "should the vendor for any other reason whatsoever be unwilling to sell (the said portion of land) to the purchaser, then the purchaser shall be entitled to an action for specific performance". This clause reinforces the conditional nature of the contract - the condition that approval for subdivision leading to a separate title for the sold property should be obtained within 4 years from the date of the agreement - and if that condition is not fulfilled there cannot be specific performance. In any event the plaintiff has not explained why he allowed 16 years to pass before he decided to sue for specific performance against the defendant company. The Court does not even know if the portion of land he bought is comprised in Surat Putus 16703, Lot 263 (registered in the name of the defendant company on 20 April 1980) or in Surat Putus 16706, Lot 318 (registered in the name of Tan Ah Bee on 15 May 1979 as trustee). In my view the 7th plaintiff is not entitled to the injunction.

In the result the injunction granted to the plaintiffs is discharged. Costs to the defendant company.

**a MALAYSIAN SOIL INVESTIGATION
SDN. BHD.**

v.

EMKO HOLDINGS SDN. BHD.

b HIGH COURT, KUALA LUMPUR
DATO' HJ. ABDUL MALEK BIN HJ.
AHAMD J.
[COMPANIES WINDING-UP NO.
D5-28-75-93]
18 AUGUST 1993

c *COMPANY LAW: Judgement in default of defence
- Petition for winding up - Whether procedures
complied with - Notice of demand - Companies
Act 1965, s. 218 - Whether notice and service
bad - Whether notice complied with judgement -
Effect of non-compliance with notice.*

d *LIMITATION: Interest due on judgement calcu-
lated for more than seven years - Whether claim
statute barred - Limitation Act 1953, s. 6(3) -
Essence of claim for interest.*

**WORDS & PHRASES: "Recovered" - Limitation
Act 1953, s. 6(3).**

e The petitioner obtained a judgement in default of defence against the respondent on 17 August 1987 for RM73,019.00 "together with interest thereon at the rate of 8% per anum from 20 May 1985 until full settlement and RM225 costs". On 10 December 1992, the petitioner issued a notice under s. 218 of the Companies Act 1965 demanding that the respondent pay the judgement sum together with interest of RM44,131.40 which the petitioner calculated from 20 May 1985 to 10 December 1992, and "a further interest at the rate of 8% per anum from 11 December 1992 to the date of realisation". The notice gave the respondent the statutory three weeks within which to submit payment. The respondent failed to comply with the notice and on that ground it was deemed unable to pay its debts. On 1 April 1993 the petitioner served the respondent with the petition and thereafter proceeded to make the relevant advertisements both in the newspaper and the Government Gazette.

h On 4 June 1993, some five months after the expiry of the prescribed time set in the notice, the respondent tendered payment to the petitioner in the amount of RM 85,260. The petitioner refused the tender on the ground that the amount tendered was not the right amount.

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